TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 41

LENORE FOMAN, PETITIONER,

vs.

ELVIRA A. DAVIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 14, 1961
CERTIORARI GRANTED JANUARY 8, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 548

LENORE FOMAN, PETITIONER,

vs.

ELVIRA A. DAVIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the First Circuit		
Record appendix consisting of proceedings in the United States District Court for the District of Massachusetts	A	A
Relevant docket entries	1	1
Complaint	2	2
Defendant's answer	4	4
Defendant's motion to dismiss complaint	7	6
Memorandum of decision on defendant's motion to dismiss, Ford, J.	7	6
Judgment	10	9
Plaintiff's motion to vacate judgment on defendant's motion to dismiss and denial thereof	10	9
Plaintiff's motion to amend her complaint and denial thereof	11	10
Complaint	11	10

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 13, 1962

	Original	Print
Notice of appeal, January 17, 1961	12a	11
Notice of appeal, January 26, 1961	12b	11
Order consolidating appeals	13	12
Argument and submission	13	12
Opinion, Hartigan, J.	15	13
Judgment	18	15
Petition for rehearing	20a	16
Opinion on petition for rehearing, Hartigan, J.	21	20
Order denying rehearing	24	22
Clerk's certificate (omitted in printing)	25	22
Order allowing certiorari	26	22

[fol. A]

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5808

LENORE FOMAN, Plaintiff-Appellant,

v.

ELVIRA A. DAVIS, Executrix, Defendant-Appellee

Record Appendix to Brief for Appellant and Proceedings to and Including October 26, 1961

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

LENORE FOMAN

v.

THE GOODS, EFFECTS AND CREDITS OF WILBUR W. DAVIS, deceased, now in the hands of Elvira A. Davis, Executrix u/w of Said Wilbur W. Davis.

RELEVANT DOCKET ENTRIES

1960

June 14 Complaint filed (jury).

Aug. 11 Defendant's motion to dismiss, filed.

11 Defendant's answer filed.

Oct. 3 Ford, D.J. Hearing on defendant's motion to dismiss, advisement—10 days in which to file briefs—plaintiff's memo. of law filed.

Dec. 5 Ford, D.J. Hearing on defendant's motion to dismiss, advisement.

16 Ford, D.J. Memorandum of decision on defendant's motion to dismiss—Defendant's motion to dismiss allowed.

19 Ford, D.J. Judgment: After hearing on defendant's motion to dismiss, in said action, and motion having been allowed, and in accordance with the Memorandum of decision, dated Dec. 16, 1960, ordered judgment for the defendant dismissing the complaint. Judgment entered.

20 Plaintiff's motion to vacate judgment on defendant's motion to dismiss, filed.

20 Plaintiff's motion to amend her complaint, filed.

20 Complaint second cause of action, filed.

[fol. 2]

1961

Jan 17 Notice of Appeal from judgment entered Dec 19, 1960, filed by plaintiff.

23 Ford, D.J. Hearing on plaintiff's motion to vacate judgment on defendant's motion to dismiss, motion denied.

23 Ford, D.J. Hearing on plaintiff's motion to amend her complaint (complt. second cause of action filed) denied.

26 Notice of Appeal from denial of above motions of Jan 23, 1961, filed by pltff.

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed June 14, 1960

1. Plaintiff is a citizen and resident of the Town of Riverdale in the State of New York. The Defendant, Elvira A. Davis, is a resident of Melrose, County of Middlesex and Commonwealth of Massachusetts, and is the Executrix under the will of Wilbur W. Davis, late of said Melrose, having been duly appointed and qualified on October 7, 1959, in the Probate Court for the County of Middlesex, Commonwealth aforesaid, Docket No. 356382. The matter in controversy exceeds the sum of ten thousand ($10,000.00) dollars, exclusive of interest and costs.

2. The Plaintiff is the daughter and the only child of the decedent, Wilbur W. Davis. For many years prior to April 1947, Plaintiff's mother, then the wife of the decedent, had been suffering from mental disorders and other illnesses and was a patient in a sanatorium known as Brattleboro Retreat, located in Brattleboro, Vermont. At or about 1947, the decedent attained retirement age, retired from his employment and, thereafter, received a retirement pension. [fol. 3] At that time, the decedent entered into an oral agreement with the Plaintiff by which it was provided that the Plaintiff would thereafter assume and pay all expenses for the care, treatment and maintenance of decedent's wife

(Plaintiff's mother) and would look after and care for her so long as she lived; that in consideration therefor the decedent would make no will and, at his death, would leave no will to the end that the Plaintiff would receive the share of the decedent's estate to which she, as his only child, would be entitled according to the laws of intestacy of the Commonwealth of Massachusetts. The decedent further agreed that he would pay to the Plaintiff, out of his pension, as a contribution toward the support of his then wife (Plaintiff's mother) amounts not to exceed fifteen ($15.00) per month.

3. In accordance with the terms of said agreement, the Plaintiff on or about May 16, 1947, entered into an agreement with Brattleboro Retreat, the sanatorium in which the decedent's wife (Plaintiff's mother) was a patient, substituting herself as the person liable for the care, support and maintenance of the decedent's wife (Plaintiff's mother) in place of the decedent and, thereafter, paid all charges incurred thereat up to and including May 1, 1951. On or about that date, the physical and mental condition of the decedent's wife (Plaintiff's mother) was such that it became advisable to remove her from the said sanatorium. Plaintiff thereupon removed the decedent's wife (Plaintiff's mother) to Plaintiff's own home where she continued to care for and provide support, maintenance, medical attendance and nursing for her until the time of her death in February, 1953.

4. Sometime in 1957, the decedent married Elvira A. Davis, the Defendant named herein. On April 15, 1959, the decedent died.

[fol. 4] 5. Although the Plaintiff has done and performed all things required of her to be done in accordance with her agreement with the decedent, as above set forth, said decedent, in breach of said agreement and contrary to the provisions thereof, made and executed a Last Will and Testament, dated August 5, 1957, which has been duly allowed in the Probate Court for the County of Middlesex, Commonwealth aforesaid, Docket No. 356382. By the terms of said will, the decedent devised and bequeathed his entire estate, except for a bequest of five thousand ($5,000.00)

dollars to his brother, to the Defendant. The decedent bequeathed nothing to the Plaintiff.

6. The total value of the assets of the estate of the decedent is approximately sixty thousand ($60,000.00) dollars. Under the laws of intestacy of the Commonwealth of Massachusetts, the Plaintiff, as the only child of the decedent surviving him, is entitled to an amount equal to two-thirds of the assets of the estate.

7. Wherefore the Plaintiff demands Judgment in the amount of forty thousand ($40,000.00), together with interest and costs.

8. Plaintiff claims trial by jury.

Lenore Foman, By Her Attorneys, Guterman, Horvitz & Rubin, Henry N. Silk.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER—Filed August 11, 1960

First Defense

1. The complaint fails to state a claim against the defendant upon which relief can be granted.
[fol. 5]

Second Defense

2. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and last sentences of Paragraph 1 of the complaint and therefore denies the same. The defendant admits the other allegations contained in Paragraph 1 of the complaint.

3. The defendant admits the allegations contained in the first three sentences of Paragraph 2 of the complaint, but denies all other allegations contained in Paragraph 2.

4. The defendant denies the allegations contained in Paragraph 3 of the complaint.

5. The defendant admits the allegations contained in Paragraph 4 of the complaint.

6. The defendant admits that Wilbur W. Davis left a will dated August 5, 1957, in which he bequeathed nothing to the plaintiff, being mindful that she is well provided for by her marriage, and in which he bequeathed $5,000 to his brother and the rest of his estate to his wife, the defendant. The defendant also admits that said will has been duly allowed by the Probate Court for the County of Middlesex, Commonwealth of Massachusetts, under docket No. 356382. But the defendant denies all other allegations contained in Paragraph 5 of the complaint.

7. The defendant admits that the gross value of the decedent's estate is approximately $60,000, but says that the net value of the estate is not yet known, and in any event will be less than $60,000. The defendant denies the allegations of the second sentence of Paragraph 6 of the complaint.

Third Defense

8. The agreement between the plaintiff and the decedent, Wilbur W. Davis, which is alleged in the complaint was an [fol. 6] oral agreement and not an agreement in writing signed by said decedent or by a person by him duly authorized. Accordingly, the right of action, if any, set forth in the complaint is barred by the statute of frauds.

Fourth Defense

9. The right of action, if any, set forth in the complaint did not accrue within six years next before the commencement of this action and is barred by the statute of limitations.

Fifth Defense

10. The agreement between the plaintiff and the decedent which is alleged in the complaint is unenforceable because it is lacking in definiteness and mutuality.

Sixth Defense

11. If there ever was an agreement between the plaintiff and the decedent, the plaintiff has been paid in full whatever was due her under such agreement and the defendant owes the plaintiff nothing.

Seventh Defense

12. If there ever was an agreement between the plaintiff and the decedent, the plaintiff abandoned, repudiated and waived it and has estopped herself from recovery under it.

Richard R. Caples, Attorney for Defendant.

[fol. 7]

In United States District Court

Defendant's Motion to Dismiss Complaint —Filed August 11, 1960

The defendant moves the court to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

Richard R. Caples, Attorney for Defendant.

Memorandum of Decision on Defendant's Motion to Dismiss—December 16, 1960

Ford, D. J.

The complaint in this action alleges an oral agreement in 1947 between plaintiff and her father, the decedent, Wilbur Davis, whereby plaintiff agreed to assume and pay the expenses for the care, treatment and maintenance of her mother, decedent's first wife, and decedent in consideration therefor agreed to leave no will so that upon his death plaintiff as his only child would receive the share of his estate to which she would be entitled under the intestacy laws of Massachusetts. It alleges that plaintiff performed her part of the agreement until the death of her mother in 1953, that thereafter in 1957 decedent married defendant Elvira Davis, that Wilbur Davis died in 1959, leaving an estate of approximately $60, and leaving a will which

has been duly probated and of which defendant is executrix. Except for a bequest of $5,000 to his brother, decedent by the terms of this will devised and bequeathed his entire estate, consisting in part of real estate, to the defendant. Plaintiff seeks damages in the amount of $40,000, the share of his estate she would have received as his only surviving child if he had died intestate.

[fol. 8] Defendant moves to dismiss on the ground that the action is barred by the statute of frauds, Mass. G.L. Ch. 259, §§ 1 and 5, which provide:

> "§ 1. Certain Contracts Actionable Only if in Writing
>
> "No action shall be brought;
>
> * * * * *
>
> "Fourth, Upon a contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them;
>
> * * * * *
>
> "Unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized."
>
> "§ 5. Agreement to Make a Will, etc., to Be in Writing.
>
> "No agreement to make a will of real or personal property or to give a legacy or make a devise shall be binding unless such agreement is in writing signed by the person whose executor or administrator is sought to be charged, or by some person by him duly authorized. This section shall not apply to any agreement made prior to May seventeenth, eighteen hundred and eighty-eight."

The basic issue is whether under § 5 an oral agreement, such as is here alleged, not to make a will is binding. No decision has been found on this precise point. Plaintiff contends for a strictly literal reading of the section which

would limit its application solely to agreements to make a will. This was the view taken by the majority of the court in *Cleaves* v. *Kenney*, 63 F. 2d 682, on which plain-
[fol. 9] tiff principally relies. In that case it was held that an oral agreement to destroy a will and codicil and die intestate did not fall within either of the statutory provisions cited above.

The opposing and seemingly sounder interpretation is that expressed by Judge Morton in his dissent in the *Cleaves* case, where he said, "I cannot doubt that what the Legislature had in mind by the expression, 'No agreement to make a will,' etc., was really, 'No agreement about making a will,' etc. If oral agreements affecting testamentary disposition of property escape the statute, if thrown into the negative form, a wide door is opened to the sort of fraud which the statute was intended to prevent." The dangers at which the statute is aimed are equally present whether the agreement is to bring about the desired disposition of property by making a will, by destroying or not destroying a will already made, or by refraining from making a will. This interpretation has been made as to similar statutes in other states. *Griffin* v. *Driver*, 202 Ga. 111; *Downey* v. *Guilfoile*, 96 Conn. 383, 387. And the only recent interpretation of § 5 by the Massachusetts courts, in *West* v. *Day Trust Co.*, 328 Mass. 381, 384, where the court held that an oral promise not to revoke a will fell within the terms of the statute, indicates that the Massachusetts court would not adopt the strictly literal construction of the majority in the *Cleaves* case.

In *Gould* v. *Mansfield*, 103 Mass. 408, it was held that an oral agreement to make a will disposing of real and personal property was a contract for the sale of lands within the meaning of §1 Fourth and was indivisible as to real and personal property. For the reasons set forth above as to §5, it would seem that the contract alleged here would equally fall within the provisions of §1 Fourth.

Defendant's motion to dismiss is allowed.

[fol. 10]

IN UNITED STATES DISTRICT COURT

JUDGMENT—December 19, 1960

FORD, D.J. After hearing on Defendant's Motion to Dismiss, in the above entitled action, and motion having been allowed, and in accordance with the Memorandum of Decision, dated December 16, 1960, it is hereby Ordered Judgment for the defendant dismissing the Complaint.

By the Court: Austin W. Jones, Jr., Deputy Clerk.

December 19, 1960

FORD, United States District Judge.

Judgment entered December 19, 1960, John A. Canavan, Clerk, by Grace V. Flood, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO VACATE JUDGMENT ON DEFENDANT'S MOTION TO DISMISS AND DENIAL THEREOF—Filed December 20, 1960

Now comes the plaintiff in the above entitled action, and moves that this Court vacate its Order allowing defendant's Motion to Dismiss and Judgment thereon, in order to permit the plaintiff to file a Motion to Amend her Complaint by adding a second cause of action for monies paid and services rendered for and on behalf of the decedent, in accordance with plaintiff's Motion herewith filed.

Lenore Foman, By Her Attorneys, Guterman, Horvitz & Rubin, Henry N. Silk.

[fol. 11] 1-23-61, FORD, D.J., Hearing—Motion Denied.

By the Court, Austin W. Jones, Jr., Dep. Clk.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO AMEND HER COMPLAINT AND DENIAL THEREOF—Filed December 20, 1960

Now comes the plaintiff in the above entitled action, and moves to amend her Complaint by adding a Second Cause of Action, as hereto annexed.

Lenore Foman, By Her Attorneys, Guterman, Horvitz & Rubin, Henry N. Silk.

COMPLAINT

Second Cause of Action

1. Plaintiff is a citizen and resident of the Town of Riverdale, in the State of New York. The defendant, Elvira A. Davis, is a resident of Melrose, County of Middlesex, and Commonwealth of Massachusetts, and is the Executrix under the Will of Wilbur W. Davis, late of said Melrose, having been duly appointed and qualified on October 7th, 1959, in the Probate Court for the County of Middlesex, Commonwealth aforesaid. Docket No. 356382. The matter in controversy exceeds the sum of Ten Thousand, ($10,000.00) Dollars, exclusive of interest and costs.

2. The defendant owes the plaintiff Twelve Thousand Five Hundred, ($12,500.00) Dollars for monies paid by the [fol. 12] plaintiff for and on behalf of the defendant, and for services rendered for and on behalf of the defendant for the period May 16th, 1947 to and including February 1st, 1953.

3. Wherefore, plaintiff demands judgment in the amount of Twelve Thousand Five Hundred, ($12,500) Dollars, together with interest and costs.

4. Plaintiff claims jury trial.

Lenore Foman, By Her Attorneys, Henry N. Silk.

1-23-61, FORD, D.J., Hearing—Motion denied.

By the Court, Austin W. Jones, Jr., Dep. Clk.

[fol. 12a]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS
—Filed January 17, 1961

Notice is hereby given that Lenore Foman, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final Judgment entered in this action on December 19th, 1960.

Guterman, Horvitz & Rubin, Henry N. Silk, Attorneys for the Appellant, Lenore Foman, 50 Congress Street, Boston, Massachusetts.

[fol. 12b]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS
—Filed January 26, 1961

Notice is hereby given that Lenore Foman, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the orders entered in this action on January 23, 1961 denying (a) Plaintiff's Motion to Vacate Judgment on Defendant's Motion to Dismiss and (b) Plaintiff's Motion to Amend Her Complaint.

Guterman, Horvitz & Rubin, Henry N. Silk, Attorneys for the Appellant, Lenore Foman, 50 Congress Street, Boston, Massachusetts.

[fol. 13]

PROCEEDINGS IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

ORDER CONSOLIDATING CASES—February 24, 1961

On February 24, 1961, an order was entered upon motion of appellant granting her leave to consolidate the two appeals and docket them as a single case in this Court.

ARGUMENT AND SUBMISSION—May 4, 1961

Thereafter, on May 4, 1961, this cause came on to be heard and was fully heard by the Court, Honorable Peter Woodbury, Chief Judge, and Honorable John P. Hartigan and Honorable Bailey Aldrich, Circuit Judges, sitting.

[fol. 15]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5808

LENORE FOMAN, Plaintiff-Appellant,

v.

ELVIRA A. DAVIS, Executrix, Defendant-Appellee.

Appeal From the United States District Court for the District of Massachusetts.

Before Woodbury, Chief Judge, and Hartigan and Aldrich, Circuit Judges.

Henry N. Silk, with whom Guterman, Horvitz & Rubin was on brief, for appellant.

Roland E. Shaine, with whom Brown, Rudnick, Freed & Gesmer was on brief, for appellee.

HARRIGAN, Circuit Judge. Plaintiff in the instant case appeals from a judgment of the United States District Court for the District of Massachusetts entered following the allowance of defendant's motion to dismiss and from orders of the district court denying plaintiff's motion to vacate judgment and to amend her complaint.

The action involves an oral agreement between the plaintiff, Lenore Fonnin, and her father, Wilbur W. Davis, the decedent, by which decedent agreed to refrain from making a will and to die intestate and plaintiff agreed to assume and pay all expenses for the care and maintenance of decedent's wife, who was also the plaintiff's mother. Under [fol. 16] the alleged agreement, plaintiff would receive a child's share according to the laws of intestacy of the Commonwealth of Massachusetts. Plaintiff alleged the making of this oral agreement and her subsequent fulfillment of her obligations under it. Plaintiff alleged that her father, in breach of the agreement, executed a Last Will and Testament, duly allowed in the Probate Court for the County of Middlesex, by which he devised and bequeathed virtually all of his estate to defendant, who was his second wife, and bequeathed nothing to the plaintiff. This suit was brought against Elvira A. Davis, decedent's widow and executrix.

Defendant filed an answer which denied the making of such agreement and set up various defenses, among them, the bar of the statute of frauds. Defendant on the same day also filed a motion to dismiss the action.

The district judge granted the motion to dismiss on the ground that the action on the oral contract was barred by the Massachusetts statute of frauds and judgment was entered on December 19, 1960.

On December 30, 1960 plaintiff filed a motion to vacate the order granting defendant's motion to dismiss and the judgment thereon in order to permit plaintiff to file a motion to amend her complaint by adding a second cause of action for monies paid and services rendered for and on behalf of the decedent. Plaintiff at the same time filed a motion to so amend and attached the proposed amendment.

On January 17, 1961 plaintiff filed a notice of appeal from the judgment entered December 19, 1960. Subsequently on January 23, 1961 the district court held a hearing on plaintiff's motions of December 20, 1960 and denied each motion. A notice of appeal from the denial of these motions was filed by plaintiff on January 26, 1961.

Preliminarily there is a question of what is properly before us on appeal. "A motion under F.R.Civ.P. 59(e) to [fol. 17] alter or amend the judgment terminates the running of the time for taking an appeal. See Rule 73. However, a motion under Rule 60(b) does not affect the finality of a judgment or suspend its operation. The plaintiff's motion seeking the vacating of the dismissal order and judgment does not designate the rule under which it is brought. If the motion to vacate the dismissal order and judgment thereon is construed as one under Rule 59(e), then the appeal taken on January 17, 1961 from the judgment entered on December 19, 1960 was premature, since the running of the time for appeal is terminated by a timely motion under Rule 59(e) and the motion had not yet been disposed of by the district court. See Rule 73; 7 Moore, Federal Practice ¶73.09 [6] (2d ed. 1955). On the other hand, if said motion is construed as an effective Rule 60(b) motion, then the finality of the judgment would not have been suspended and the January 17, 1961 appeal would be properly before us.

Although the cases do authorize the vacating of a judgment under both rules in the proper circumstances, *Klapprott* v. *United States*, 335 U. S. 601, 615 (1948), judgment modified 336 U. S. 942 (1949); *Patapoff* v. *Vollsted's Inc.*, 267 F.2d 863 (9 Cir. 1959); *Kelly* v. *Delaware River Joint Commission*, 187 F.2d 93 (3 Cir.), cert. denied, 342 U. S. 812 (1951); 6 Moore, Federal Practice ¶59.12 [1] (2d ed. 1953), we believe that the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired. Cf. *Chicago & N. W. Ry. Co.* v. *Davenport*, 95 F.Supp. 469 (S.D.Iowa 1951) which is criticized in 7 Moore, Federal Practice ¶60.27 [2], p. 306 n.23 (2d ed. 1955). We are unable to find any case which construed a motion to vacate a judgment made within 10 days of the judgment as a Rule

60(b) motion so that an appeal taken before a disposition of the motion would be timely. Plaintiff's second notice [fol. 18] of appeal could have specified the judgment of December 19, 1960. Lacking such reference, we believe that the appeal insofar as the judgment is concerned must be dismissed. See *Aberlin* v. *Zisman*, 244 F.2d 620 (1 Cir.), cert. denied 355 U. S. 857 (1957).

In regard to the contention that the district court abused its discretion in not allowing plaintiff's motions to vacate the judgment and amend her complaint, there is nothing presented by the record to show the circumstances which were before the district court for its consideration in ruling on the motions. We, therefore, cannot say that the district court abused its discretion.

Judgment will be entered dismissing the appeal insofar as it is taken from the district court's judgment entered December 19, 1960; and affirming the orders of the district court entered January 26, 1961.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

JUDGMENT—June 26, 1961

This cause came on to be heard on consolidated appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The orders of the District Court entered January 26, 1961, are affirmed; and the appeal from the judgment of the District Court entered December 19, 1960, is dismissed.

By the Court: Roger A. Stinchfield, Clerk.

Approved: Peter Woodbury, Ch. J.

[fol. 20a]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed July 10, 1961

To the United States Court of Appeals for the First Circuit and the Honorable Judges thereof:

Appellant in the above-entitled cause presents this her petition for a rehearing of the above-entitled cause, and in support thereof respectfully shows:

I.

The opinion of the Court, dated June 26, 1961, orders that judgment be entered dismissing the appeal insofar as it is taken from the District Court's judgment entered on December 19, 1960 (p. 4 [printed herein on page 15, side folio 18]), on the ground that the appellant's notice of appeal filed on January 17, 1961, was premature (p. 3 [printed herein on page 14, side folio 17]) and that appellant's subsequent notice of appeal, filed on January 26, 1961, was ineffective to raise on appeal said judgment (p. 4 [printed herein on page 15, side folio 18]).

II.

The Court's holding that appellant's second notice of appeal (filed on January 26, 1961) was ineffective in appealing the original judgment of the District Court was [fol. 20b] based on the ground that this notice referred only to the denial of appellant's motions (to vacate the order dismissing the complaint and to permit amendment of her complaint), but did not mention the judgment of December 19, 1960, although the "notice of appeal could have specified" (pp. 3-4 [printed herein on pages 14-15, side folios 17-18]) this judgment. The Court stated: "Lacking such reference, we believe that the appeal insofar as the judgment is concerned must be dismissed" (p. 4 [printed herein on page 15, side folio 18]).

III.

In holding this second notice of appeal ineffective in appealing the original judgment the Court cited as authority a dictum in a recent case in this Circuit.[1] The Court has overlooked, however, a line of cases directly on point on the issue of the effect of a notice of appeal such as that filed by appellant on January 26, 1961.[2] These cases, rep-
[fol. 20c] resenting the opinion of the United States Supreme Court as well as almost every federal judicial circuit, including the First Circuit, have held (or noted with approval the holding) that a judgment of a District Court is properly on appeal before a Court of Appeals although the notice of appeal does not specify the judgment being appealed from and refers, instead, to the District Court's order denying a motion under Rule 59 (or a motion having a similar effect on the finality and appealability of the judg-

[1] In *Aberlin* v. *Zisman*, 244 F. 2d 260 (1st Cir. 1957), cert. den. 355 U.S. 857 (1957), the notice of appeal analogous to the one in issue in the instant case was from an order denying a motion for a new trial. Although the Court nominally addressed itself only to this order and not to the judgment, it stated that on the appeal "appellant is free to assert any alleged errors which entered into and infected the judgment . . ." *Id.* 261. Thus, since the scope of review on review of the order denying the motion was as broad as the scope of review on review of the original judgment, the issue presented in the instant case—whether a notice of appeal from the order denying a motion properly appeals from the original judgment—was neither before the Court nor was it considered by the parties. The *Aberlin* case is therefore of little value as precedent in the instant appeal.

[2] *State Farm Mutual Automobile Insurance Co.* v. *Palmer*, 350 U.S. 944 (1956), reversing 225 F. 2d 876 (9th Cir. 1956); *Conway* v. *Pennsylvania Greyhound Lines, Inc.*, 243 F. 2d 39, 40, n. 2 (D.C. Cir. 1957); *Creedon* v. *Loring*, 249 F. 2d 714 (1st Cir. 1957), citing *United States* v. *Best*, 212 F. 2d 743, 744-745, n. (1st Cir. 1954); *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65, 68 (3d Cir. 1958); *United States* v. *Stromberg*, 227 F. 2d 903, 904 (5th Cir. 1955); *Holz* v. *Smullon*, 277 F. 2d 58, 61 (7th Cir. 1960); *Nolan* v. *Bailey*, 254 F. 2d 638, 639 (7th Cir. 1958); *Railway Express Agency, Inc.* v. *Epperson*, 240 F. 2d 189, 192 (8th Cir. 1957); and *Cheney* v. *Moler*, 285 F. 2d 116, 117-118 (10th Cir. 1960). And see *Val Marine Corp.* v. *Costas*, 256 F. 2d 911, 916 (2d Cir. 1958); *Gunther* v. *E. I. DuPont DeNemours & Co.*, 255 F. 2d 710, 717 (4th Cir. 1958); and *Trivette* v. *N.Y.L.I.C.*, 270 F. 2d 198 (6th Cir. 1959).

ment). In overlooking this line of cases the Court has rendered a decision in conflict with the overwhelming weight of authority and one which, in effect, overrules two cases in this very circuit without considering or even mentioning them in its opinion.

IV.

By its opinion in this cause, it is respectfully submitted, the Court has disregarded the principles underlying the system of federal procedure—principles of liberality, against technicality and in favor of deciding cases on the merits.[3]

[fol. 20d] For the reasons stated above, appellant requests that a rehearing be granted and that at such rehearing the judgment of this Court be reversed and the cause

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[3] "The filing of a simple notice of appeal was intended to take the place of more complicated procedures to obtain review, and the notice should not be used as a technical trap for the unwary draftsman." *Donovan* v. *Esso Shipping Co., supra*, n. 2. See 6 Moore, Federal Practice ¶ 59.12 (2d ed. 1955); 5 *id.* ¶ 52.11[3]; 2 *id.* 55, stating that "Decisions are to be on the merits and not on procedural niceties." "The spirit of the Rules is that technical requirements are abolished and judgments be founded on facts and not on formalistic defects." The purpose of modern procedure is "to secure a disposition of litigation on the merits rather than by collateral methods"; a court should "avoid a strict technical interpretation which might work a hardship on the litigants." The author also states that one of the major contributions of the Rules is "a general emphasis against technical error and that harmless error be treated as harmless error." 1 *id.* 5041. See also Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155: "Procedure, to be sure, is not an end in itself. It is merely the means by which justice is achieved." The adoption of the Rules, says the author, "brought about a new era in the administration of justice,—an era characterized by a desire to reduce technicalities to a minimum and to decide all cases on their merits as expeditiously as possible." And see Clark, *Fundamental Changes Effected by the New Federal Rules*, 15 Tenn. L. Rev. 551 (1939); Moscowitz, *Trends in Federal Law and Procedure*, 21 N.Y.U.L.Q. 1, 27 (1946); and Brown, *Eight Months Under the New Rules*, 25 A.B.A.J. 602, 604 (1939).

Note how lightly Magruder, C.J. disposed of the issue which is before this Court in his opinion in *United States* v. *Best, supra*, n. 2; and in *Creedon* v. *Loring, supra*, n. 2, he denied the appellee's motion to dismiss the appeal, saying: "It is founded on pure technicality."

be considered as properly before this Court on appeal on the merits (treating the notice of appeal filed on January 26, 1961, as properly appealing the judgment of the District Court entered on December 19, 1960, which became final and appealable on January 23, 1961).

Respectfully submitted,

Henry N. Silk, Guterman, Horvitz & Rubin, Attorneys for the Appellant.

Milton Bordwin, Of Counsel.

July 7, 1961.

[fol. 20e] Certificate

I, Henry N. Silk, attorney for appellant herein, hereby certify, in accordance with the requirements of Rule 31 of this Court, that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

Henry N. Silk

[fol. 20f] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 21]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5808

LENORE FOMAN, Plaintiff-Appellant,

v.

ELVIRA A. DAVIS, Executrix, Defendant-Appellee.

Appeal From the United States District Court for the District of Massachusetts.

Before Woodbury, Chief Judge, and Hartigan and Aldrich, Circuit Judges.

Henry N. Silk, with whom Guterman, Horvitz & Rubin was on brief, for appellant.

Roland E. Shaine, with whom Brown, Rudnick, Freed & Gesmer was on brief, for appellee.

OPINION OF THE COURT ON PETITION FOR REHEARING —August 17, 1961

HARTIGAN, Circuit Judge. Plaintiff's petition for rehearing seeks to read into our opinion much broader principles than are justified or were intended. In holding that the second notice of appeal did not bring before us the propriety of the judgment of dismissal we did not intend to overrule or qualify our earlier cases, of which *Creedon* v. *Loring*, 249 F.2d 714 (1 Cir. 1957), cited by plaintiff, is an example. In *Creedon* v. *Loring*, following the entry of judgment for the defendants upon verdicts of the jury, plaintiffs filed a motion for a new trial. After that motion had been denied, plaintiffs appealed "from the order [fol. 22] . . . denying plaintiff's motion for a new trial." The defendants moved to dismiss the appeal as not having been taken from the final judgment. We denied this motion as "founded on a pure technicality." We pointed out, however, that plaintiffs were limited in their appeal to those alleged errors "on which the motion for the new trial was based; it is not open to appellant to urge other alleged errors at the trial which might have been presented on an appeal from the original judgment itself." Id. at 717.

Similarly, other circuits have recognized that an appeal from the denial of a new trial may carry back to the judgment in which the errors sought to be rectified by the motion occurred. See, e.g., *Cheney* v. *Moler*, 285 F.2d 116, 118 (10 Cir. 1960); *Holz* v. *Smullan*, 277 F.2d 58 (7 Cir. 1960). In *Donovan* v. *Esso Shipping Company*, 259 F.2d 65 (3 Cir. 1958), cert. denied, 359 U.S. 907 (1959), the court said: "A defective notice of appeal should not warrant dismissal for want of jurisdiction where the intention to appeal from a specific judgment may be reasonably inferred from the text of the notice and where the defect has not materially misled the appellee. . . . For example,

an appeal from the denial of a new trial may under exceptional circumstances be treated as an inept attempt to appeal from the judgment which preceded that denial." However, the court went on to say: "While mere technical omissions in the notice of appeal should not deprive appellant of his right of review, where the appeal is taken specifically only from one part of the judgment the appellate court has no jurisdiction to review the portion not appealed from." Id. at 68. The notice of appeal in that case specifically sought review of the dismissal of all causes of action "other than that cause of complaint on maintenance and cure." The court held it was without jurisdiction to consider the maintenance and cure question. All of these cases, however, indicate that the determinative ele- [fol. 23] ment is one of intent, i.e., whether the intent to appeal from the judgment may be reasonably inferred from the notice of appeal.

In the case at bar, following the original judgment of dismissal, plaintiff did not move for review or reconsideration, comparable to a motion for a new trial, but moved for leave to amend the complaint by adding a self-styled "Second Cause of Action," by which she sought substantially less damages, upon a different theory, predicated on the assumption that the dismissal of the first cause of action was in fact correct. This was, by hypothesis, an independent matter. Any error involved in the denial of this motion for leave to amend could relate back in no way to errors which entered into and infected the original judgment. Also, militating against plaintiff's position that the second notice of appeal was intended to be an appeal from the original judgment of dismissal is the factor that plaintiff plainly thought she appealed from that judgment by her first notice of appeal. Now that that notice of appeal has been held premature, plaintiff contends that the second notice of appeal is sufficient. We believe, however, that under the principles of the above-cited cases, plaintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal.

If plaintiff's second appeal was in her mind intended to encompass the old cause of action rather than, or in ad-

dition to, the proposed new one, it was deficient not technically, but in substance.

The petition for rehearing is denied.

[fol. 24] On the same day, August 17, 1961, the following order of Court was entered:

ORDER OF COURT DENYING PETITION FOR REHEARING —August 17, 1961

It is ordered that the petition for rehearing filed by appellant on July 10, 1961, be, and the same hereby is, denied.

By the Court: Roger A. Stinchfield, Clerk.

[fol. 25] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 26]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.